

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
	:	
of	:	
	:	
ALLETOR CORPORATION	:	DETERMINATION
D/B/A OLIVER'S	:	
	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period November 30, 1979	:	
through May 31, 1982.	:	
	:	

Petitioner, Alleator Corporation d/b/a Oliver's, 279 Front Street, Binghamton, New York 13905, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period November 30, 1979 through May 31, 1982 (File No. 49204).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, State Office Building Annex, 164 Hawley Street, Binghamton, New York, on November 18, 1986 at 9:15 A.M., with all briefs to be filed by March 2, 1987. Petitioner appeared by Griffen & Smith, Esqs. (Frederick A. Griffen, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether the assessment of additional sales tax due from petitioner as the result of a field audit of petitioner's business operations should be sustained.

FINDINGS OF FACT

1. During the period at issue petitioner, Alleator Corporation d/b/a Oliver's, operated a bar and restaurant at premises located at 279 Front Street in Binghamton, New York.
2. In or about June 1982, the Audit Division initiated a field audit of petitioner's business operations. The auditor requested production of petitioner's records and, upon review of the records made available, found that petitioner had neither a cash receipts journal nor a cash

disbursements journal and had only scattered purchase invoices. Petitioner had not filed corporation tax returns for any of the years 1978 through 1981. No cash register tapes were made available to the auditor and only a few scattered guest checks were available for the period under audit. Initial review of the records made available disclosed negative markups (purchases exceeding sales) for both food and beer and disclosed a markup on liquor of approximately 25 percent.

3. Based on his request for and review of the aforementioned records, the auditor determined that such records were incomplete and insufficient for purposes of verifying either petitioner's gross sales or its taxable sales. Hence, the auditor concluded that the records were inadequate for audit purposes, and determined that indirect audit methods would be utilized in order to verify the accuracy or establish the inaccuracy of petitioner's sales tax returns.

4. The auditor canvassed the various liquor, wine and beer distributors in petitioner's geographic area in order to determine the amount of purchases of such items by petitioner during the audit period. The auditor compared petitioner's purchase prices (costs) for liquor, wine and beer per replies to the canvass letters, with petitioner's selling prices for such items as stated on a bar fact sheet and bar questionnaire completed by petitioner's manager and as shown on those guest checks available, in order to determine a markup percentage for such items. The markups, as determined, were 215 percent for beer and 305 percent on liquor and wine purchases.

5. The auditor also determined, given the large number of food distributors in petitioner's area, that canvass letters to determine food purchases would not be utilized. Rather, the auditor used those food purchase invoices available during the audit period to determine food purchases for the entire audit period. These purchases were averaged by dividing total food purchases per invoices by the number of months for which such invoices existed, with the resultant per month purchase amount multiplied by the 29 months in the audit period to arrive at food purchases. The auditor initially decided a markup of 125 to 150 percent on food purchases was appropriate based upon audit experience in the area with similar sized restaurants, but reduced such markup to 100 percent over cost to account for petitioner's claim that various free food giveaways, including

Dine-A-Mate sales (see ___ infra.), occurred on a regular basis during the audit period.

6. The aforementioned markups were applied to purchases of food, beer, wine and liquor as determined on audit to arrive at audited taxable sales. Audited taxable sales were compared to reported taxable sales (per returns) to arrive at an error rate of 1.24 percent which, when applied to tax reported and paid per petitioner's returns, resulted in a deficiency of \$10,359.54.

7. On September 20, 1983, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1979 through May 31, 1982 in the amount of \$10,359.54, plus interest. This assessment was issued as the result of the aforementioned field audit. Petitioner had previously executed validated consents with respect to the statute of limitations, the latest of which allowed assessment for the period September 1, 1979 through May 31, 1980 to be made at any time on or before September 20, 1983.

8. It is noted that in determining the beer markup percentage, the Audit Division's calculation reflected 50 percent of petitioner's beer sales as being made at happy hour prices and 50 percent at regular prices. The same allowance in calculation of markup was allowed for liquor sales.

9. Petitioner timely protested the assessment and has maintained that the audit results overstate petitioner's sales, in that petitioner consistently allowed reduced prices both on its beer and liquor sales and on its food sales. Petitioner specifically alleged that a large percentage of its business was represented by Dine-A-Mate sales. The Dine-A-Mate promotional program, in general, allows that with the presentation of a Dine-A-Mate coupon and the purchase of two dinners, there is no charge for one (the lesser priced) of the dinners.

10. Subsequent to the audit, petitioner supplied random guest checks for three different short periods (covering in total 18 days) during the audit period. These random guest checks showed that approximately 17 percent of petitioner's total food sales were Dine-A-Mate sales. Petitioner, however, has claimed varying percentages of food sales were due to Dine-A-Mate, with such claimed percentages being "at least 45%" and "as high as 90%".

11. At hearing, petitioner alleged that while guest checks were not available for the audit period, cash register tapes were maintained and may have been available at the time of the audit. These tapes were assertedly located either on top of a refrigerator at petitioner's premises or, if not at petitioner's premises, at the premises of a produce store operated by petitioner's manager. Petitioner alleges that when the produce store was closed, the records were misplaced during transit to petitioner's premises and have not been located since.

12. At hearing, petitioner presented a large number of Dine-A-Mate coupons as well as a large number of free drink or two-for-one or three-for-one drink coupons. These coupons for drinks were not cancelled or otherwise invalidated to show use, and no guest checks were submitted in connection with or tied to the Dine-A-Mate coupons. Petitioner submitted a summary schedule indicating, in total for the audit period, \$68,865.00 of coupon sales (meaning Dine-A-Mate and drink coupons). Petitioner claims such sales were not subject to tax and that additional sales as determined per audit (\$89,436.00) should be reduced (by the \$68,865.00 summary amount), to total additional sales of \$20,601.00.

13. In preparing the aforementioned summary schedules, various values were assigned to the coupons by petitioner, petitioner's manager and/or one of its other employees. The bulk of the coupons were valued at \$10.00. It is noted that the highest priced food item sold by petitioner, per information provided by petitioner, was \$8.95. Some of the coupons indicated a face value, while others did not. Petitioner urges that some reduction, in addition to that allowed by the Audit Division on audit, should be afforded based on the large volume of Dine-A-Mate coupons and other coupons submitted in evidence by petitioner at hearing.

14. Finally, petitioner maintains that for the period ended February 29, 1980, sales per returns of \$32,107.00, which far exceed sales reported for any of the other quarters by petitioner, represents the misplacement of a decimal point and that such sales should have been reported at \$3,210.70. Assuming this claim to be correct, based on the audit methodology used, it would result in a higher amount of unreported sales and a higher error rate, and thus higher additional tax due.

CONCLUSIONS OF LAW

A. That Tax Law § 1138(a) provides that where a return required to be filed is incorrect or insufficient, the Audit Division may determine the amount of tax due from such evidence as may be available including, where necessary, external indices. It is well settled that where a taxpayer does not maintain and make available such records as will allow verification of the accuracy of returns filed and tax due, the Audit Division may resort to indirect audit methodologies in carrying out its audit function. However, in determining the amount of a sales tax assessment, it is the duty of the Audit Division to select a method "reasonably calculated to reflect the taxes due (Matter of Grant Co. v. Joseph, 2 NY2d 196, 206)." (Matter of Meyer v. State Tax Commn., 61 AD2d 223, 227, lv denied 44 NY2d 645.) In turn, when the Audit Division employs such a method, it becomes incumbent upon the petitioner to establish error (Matter of Meyer v. State Tax Commn., supra).

B. That given the records available to the Audit Division and the results of the Audit Division's analysis thereof, the determination that petitioner's returns as filed were incorrect was reasonable. Accordingly, the Audit Division was properly entitled to resort to indirect audit techniques in determining the amount of tax due by petitioner. The methodologies used by the Audit Division in this case, given the records available, were reasonable and the amount of tax determined to be due was proper.

C. That petitioner, in turn, has not provided such evidence as would refute or show error in the Audit Division's determination and assessment. Some of the evidence presented was contradictory in nature to the points sought to be established by petitioner; other testimony was in the nature of speculation at best. Accordingly, petitioner has not established a basis for reduction or cancellation of the assessment.

D. That the petition of Alletor Corporation d/b/a Oliver's is hereby denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated September 20, 1983 is sustained.

DATED: Albany, New York
September 18, 1987

ADMINISTRATIVE LAW JUDGE